NO. 80-5850

ORIGINAL COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RECEIVED
JAN 21 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

WILLIAM ANTHONY BROOKS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

DARYL A. ROBINSON
Assistant Attorney General
Counsel of Record

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

QUESTION PRESENTED

1.

Were the statutory aggravating circumstances which existed in Petitioner's case properly instructed by the trial court, found by the jury, and reviewed on appeal by the Supreme Court of Georgia?

TABLE OF CONTENTS

Page

QUESTION PRESENTED. I

STATEMENT OF THE CASE. 1

REASON FOR NOT GRANTING THE WRIT

I. THE STATUTORY AGGRAVATING CIRCUMSTANCES WHICH EXISTED IN PETITIONER'S CASE WERE PROPERLY INSTRUCTED BY THE TRIAL COURT, FOUND BY THE JURY, AND REVIEWED ON APPEAL BY THE SUPREME COURT OF GEORGIA. 3

CONCLUSION. 12

CERTIFICATE OF SERVICE. 13

TABLE OF AUTHORITIES

Cases Cited: Page

Brooks v. State, 244 Ga. 574, 261 S.E.2d 379 (1979). 1

Brooks v. State, 246 Ga. 262, ___S.E.2d___ (1980). 2

Burger v. State, 245 Ga. 458, 265 S.E.2d 797 (1980). 10

Burger v. Georgia, ___U.S.___, 27 Crim.L.Rptr. 4084 (1980). 10

Gates v. State, 244 Ga. 587 (261 SE2d 349)(1979). 5, 10

Gates v. Georgia, ___U.S.___, 26 Crim.L.Rptr. 4237 (1980). 10

Godfrey v. Georgia, 446 U.S.___(1980). 2,4,7

Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974). 10

Gregg v. Georgia, 428 U.S. 153 (1976). 9,10

Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980). 4,6,7

Westbrook v. Balkcom, ___U.S.___, 28 Crim.L.Rptr. 4087 (1980)(Stevens,J., concurring) 10

Statutes Cited:

Ga. Code Ann. § 27-2537 3

Ga. Code Ann. § 27-2534.1 . . . . . passim

NO. 80-5850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WILLIAM ANTHONY BROOKS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

Petitioner, William Anthony Brooks, was convicted in the Superior Court of Muscogee County, Georgia, for the kidnapping, rape, armed robbery and murder of Carol Jeannine Galloway. The jury found two statutory aggravating circumstances: (1) the murder was committed while the offender was engaged in the commission of rape and armed robbery and (2) the murder was outrageously or wantonly vile, horrible, or inhuman.

Brooks' convictions and sentences [1/] were affirmed by the Supreme Court of Georgia in Brooks v. State, 244 Ga. 574, 261 S.E.2d 379 (1979). The evidence, set forth in detail in the appellate decision, showed that Brooks accosted Miss Galloway, age 23, at gunpoint in the front yard of her parents' residence and, at gunpoint, ordered her to get into her car and drive away.

> . . . [Brooks] ordered Miss Galloway to park the car and walk into the nearby woods where he first robbed Miss Galloway of at least $20.00 and then raped her. Following appellant's completion of the sex act, Miss Galloway reiterated her continuing plea that appellant permit her to leave. Appellant's sole response was to ask

---

1/ Brooks was sentenced to death for murder, to life for kidnapping and rape, and to twenty years for armed robbery.

> Miss Galloway if she had ever experienced sex before, and when told by Miss Galloway that she had not, to taunt her with his disbelief. At this point, Miss Galloway began to scream. When she did not heed his warning to stop, the appellant, to impress upon Miss Galloway the seriousness of his warning, aimed his gun at her face and pulled the handle back into a cocked position. When Miss Galloway continued to scream, the appellant fired one shot, his bullet piercing Miss Galloway's lower neck and causing a slow but steady loss of blood which resulted (but only after the passage of a full two hours) in her death.

Id. at 575. Brooks fled, and was not captured for almost one month. After arrest, he confessed to the crimes and his confessions were introduced into evidence. Id.

Brooks petitioned this Court for a writ of certiorari; on May 27, 1980, the Court granted the petition, vacated that portion of the judgment affirming the death penalty, and remanded to the Supreme Court of Georgia for further consideration in light of Godfrey v. Georgia, 446 U.S.___(1980). On remand, that court reexamined the imposition of the death penalty and reaffirmed Brooks' sentence of death. Brooks v. State, 246 Ga. 262, ___S.E.2d ____(1980).

Following the reaffirmance of his death penalty, Brooks filed this second petition for a writ of certiorari.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE STATUTORY AGGRAVATING CIRCUMSTANCES WHICH EXISTED IN PETITIONER'S CASE WERE PROPERLY INSTRUCTED BY THE TRIAL COURT, FOUND BY THE JURY, AND REVIEWED ON APPEAL BY THE SUPREME COURT OF GEORGIA.

Petitioner enumerates four reasons for which the writ of certiorari should be granted. Three grounds challenge the statutory aggravating circumstances which were found; the fourth ground alleges some sort of right to submit briefs and oral argument to the Supreme Court of Georgia on remand. Neither ground presents any sufficient reason for granting the petition for a writ of certiorari.

Petitioner argues that review by the Supreme Court of Georgia on remand does not cure what he claims was an insufficiently guided jury. The implication is review by the Supreme Court of Georgia is, in effect, a de novo sentencing and the appropriate course of action would be to order new jury sentencing. If that is Petitioner's assertion, it is without support. Upon initially reviewing Petitioner's death sentence, the Supreme Court of Georgia considered the death penalty as it is required to do under Georgia law. Ga. Code Ann. § 27-2537. As required, the review was conducted. In remanding, this Court did not order the original death sentence vacated. Rather, the Court vacated the judgment of the state appellate court dealing with sentence review. Therefore, on remand, the Supreme Court of Georgia was merely reconducting its appellate review of the death penalty.

The state court did not reimpose the death sentence but merely reaffirmed the death sentence already imposed by the trial jury.

Petitioner contends he has somehow been harmed, without specifying the nature of the harm, because he was not allowed to submit additional briefs on remand. There is no requirement that the Supreme Court of Georgia allow such briefs filed or oral argument made. These are exclusively matters within the province of the Supreme Court of Georgia and the rules of that court. That court merely conducted a portion of its appellate review in more detail, reconsidering its own judgment.

More importantly, Petitioner contends this Court should grant certiorari to consider whether the Supreme Court of Georgia construed Ga.Code Ann. § 27-2534.1(b)(7) in an unconstitutional manner. Contrary to Petitioner's assertions, since this Court decided Godfrey, the Supreme Court of Georgia has gone to great lengths to make its appellate review an elaborate and detailed process by examining each case, including the facts surrounding the offense, thoroughly. As this Court is aware, in Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980), the court in detail defined and explained the seventh aggravating circumstance.

In considering Petitioner's death sentence on remand in light of Godfrey, the Supreme Court of Georgia found material differences between Godfrey and Brooks which distinguished Brooks' act from those cases in which the death penalty is not appropriate:

> Having reconsidered the facts of the present case as directed, this court now reaffirms on two, independent grounds, the appellant's sentence of

death for the murder of Carol Jeannine Galloway.

First, in the present case, the jury's verdict for the death sentence was predicated, not only on Code Ann. § 27-2534.1(b)(7), but also on Code Ann. § 27-2534.1(b)(2)(The jury found, beyond a reasonable doubt, that the murder was committed during the appellant's commission of a rape and an armed robbery).

"Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon." Gates v. State, 244 Ga. 587, 599 (261 SE2d 349)(1979).

Therefore, we reaffirm the appellant's sentence of death on the ground that the jury's finding of Code Ann. § 27-2534.1 (b)(2) was supported by legally sufficient evidence.

Moreover, in the present case, the jury found that the appellant's murder of Ms. Galloway reflected, beyond a reasonable

doubt, "depravity of mind" under Code Ann. § 27-2534.1(b)(7) and "when only facts occurring prior to death are relied upon . . ., the fact that the victim was tortured will . . . support a finding of depravity of mind . . ." Hance v. State, 245 Ga. 856 (268 SE2d 339)(1980).

Torture occurs when the victim is subjected to serious physical abuse before death. Godfrey v. Georgia, supra; Hance v. State, supra.

In the present case, the victim died, not instantaneously, but a full two hours after being shot in the neck and abandoned by the appellant, death resulting from a slow but steady loss of blood.

Also, it is beyond question that the appellant seriously and sexually abused Ms. Galloway. See Hance v. State, supra (physical abuse includes sexual abuse for purposes of proving torture under Code Ann. § 27-2534.1(b)(7)).

Finally, following his rape of Ms. Galloway, the appellant taunted his victim with her lost virginity and

made her the target of his gun, said acts combining to cause her to scream uncontrollably. See Hance v. State, supra. (physical abuse includes psychological abuse resulting in mental anguish to the victim in anticipation of physical harm).

Accordingly, this court reaffirms the appellant's sentence of death on the ground that, unlike the jury's finding of Code Ann. § 27-2534.1(b)(7) in Godfrey v. Georgia, supra, the jury's finding of said statutory aggravating circumstance in the present case was supported by legally sufficient evidence.

246 Ga. at 263-64.

Petitioner complains of the lack of guidance in the trial court's instructions to the jury. Nevertheless, a review of the trial court's sentencing instructions shows a thorough and accurate charge to the jury. The trial court instructed:

> . . . Your responsibility at this stage of the trial is to determine first whether any mitigating or aggravating circumstances existed at the time the murder was committed, which would authorize you to recommend the death penalty for the defendant.

> Before you would be authorized to recommend the death penalty, you must first determine whether, at the time the crime was committed, the following Statutory, aggravating circumstances existed beyond a reasonable doubt. . . .

(T. 885). After instructing the jury on the pertinent statutory aggravating circumstances, the trial court continued:

> Now, ladies and gentlemen, if you find that either of these aggravating circumstances existed beyond a reasonable doubt, and if you recommend the death penalty, then the Court is required by law to sentence the defendant to death.
>
> On the other hand, you can see fit, ladies and gentlemen, whether aggravating circumstances existed or not, to recommend mercy for the defendant if this should be your finding, then in that event the Court is required by law to sentence the defendant to life imprisonment.
>
> In arriving at your determination, you are authorized to consider all the evidence received throughout this trial, presented by both the State and the defendant. You are authorized to include in your consideration the facts and the circumstances, if any, in mitigation and aggravation.

> Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame.
>
> Aggravating circumstances are those, ladies and gentlemen, which increase the guilt or the enormity of the offense, or add to its injurious consequences.
>
> * * *
>
> Now, ladies and gentlemen, even though you find Statutory, aggravating circumstances exist, you may refuse to recommend the death penalty, in which event the defendant would receive a sentence of life imprisonment.

(T. 886-88). The jury was plainly instructed that it could recommend a sentence of death only if it found statutory aggravating circumstances. The jury was further instructed that even if it found such circumstances it need not impose the death penalty and it could in its discretion recommend mercy. Finally, the jury was told that unless aggravating circumstances existed, a life sentence only could be imposed. One cannot imagine a more explicit and correct instruction to the jury on its role under the Georgia death penalty statute.

Petitioner also argues that the presence of a second aggravating circumstance cannot save the death penalty. The Georgia death penalty statute was upheld in Gregg v. Georgia, 428 U.S. 153 (1976).

This Court upheld Gregg's death penalty even though the jury had been allowed to impose a death penalty for armed robbery. Id. at 161-62. The Supreme Court of Georgia had ruled that the death penalty for armed robbery was disproportionate. Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974). Yet the fact the jury considered and imposed a death penalty for armed robbery did not require that the death penalty for murder be vacated.

The Supreme Court of Georgia has held that even if the finding of some aggravating circumstances must be set aside, the death penalty will be upheld if there still exists one aggravating circumstance. Burger v. State, 245 Ga. 458, 460-61, 265 S.E.2d 797 (1980); Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349 (1979). This Court has denied writs of certiorari in both of these cases. Burger v. Georgia, ___U.S.___, 27 Crim. L.Rptr. 4084 (1980); Gates v. Georgia, ___U.S.___, 26 Crim.L.Rptr. 4237 (1980). In denying a writ of certiorari in another Georgia death penalty case, this Court noted:

> The Georgia Supreme Court . . . decided to adhere to its prior position that a death penalty imposed on the basis of plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, will not be set aside simply because one of these aggravating circumstances is vulnerable. . . . [T]he Georgia Supreme Court's position is clear and . . . I consider it consistent with this Court's decisions.

Westbrook v. Balkcom, ___U.S.___, 28 Crim.L.Rptr. 4087-88 (1980) (Stevens, J., concurring). As recognized, Georgia law is

well-settled concerning the sufficiency of multiple aggravating circumstances. Of course, the effect of the failure of an aggravating circumstance need not be considered in this case because both aggravating circumstances were properly instructed, considered, and applied. Nevertheless, either circumstance standing alone is sufficient.

CONCLUSION

No sufficient reasons having been presented, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

DARYL A. ROBINSON
Assistant Attorney General
Counsel of Record

132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349